

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXXX

Petitioner

v

File No. 124123-001

Total Health Care USA

Respondent

Issued and entered
this 17th day of January 2012
by R. Kevin Clinton
Commissioner

ORDER

I. PROCEDURAL BACKGROUND

On October 26, 2011, a request for external review on behalf of XXXXX was filed with the Commissioner of Financial and Insurance Regulation under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.* The request was filed by Lindstrom Obesity Advocacy of Chula Vista, California acting as the authorized representative of Ms. XXXXX (Petitioner).

The Petitioner receives health care benefits under a certificate of coverage issued by Total Health Care USA (THC). The Commissioner notified THC of the request for external review and requested the information THC used in making its final adverse determination. The Commissioner received THC's response on October 28, 2011. After a preliminary review of the material submitted, the Commissioner accepted the request for external review on November 2, 2011.

Because this case involves medical issues, the Commissioner assigned the matter to an independent review organization which submitted its analysis and recommendations on November 16, 2011. It is the practice of the Commissioner in external reviews involving bariatric surgery, to obtain the analysis of two independent, board-certified medical reviewers, an internist and a surgeon. Those reviews were obtained in the present case. The findings of those reviewers are summarized below. (Copies of the complete reports are being provided to the parties with this Order.)

II. FACTUAL BACKGROUND

The Petitioner has a history of morbid obesity. In June 2011, she requested authorization for bariatric surgery. THC denied the request concluding the Petitioner did not meet its criteria for bariatric surgery coverage.

Petitioner appealed the denial through THC's internal grievance process. THC affirmed its denial in a final adverse determination issued August 29, 2011.

III. ISSUE

Did THC properly deny Petitioner's request for bariatric surgery?

IV. ANALYSIS

Petitioner's Argument

Petitioner has tried and failed numerous weight loss efforts including a low calorie diet, over the counter pills, and the medications Adipex and Fastin without much success. Her physicians recommended bariatric surgery.

In a letter dated August 2, 2011, her physician, Dr. XXXXX wrote:

. . . Patient has hypertension, GERD/reflux, sleep apnea, and arthritis of [her] back, hips, knees and ankles, due to her weight.

Patient's health is endangered by [her] morbid obesity, weight 258 lbs., height 5'3" and BMI 45.60.

Patient is a good candidate for the surgery and committed to participate in the post surgical support meetings of the bariatric surgery program. Patient understands the surgical risks.

In a letter dated June 19, 2011, Petitioner's therapist wrote:

[Petitioner] appears to be emotionally stable with no suicidal or homicidal tendencies or interests noted. She has struggles with weight problems for her entire adult life and there is a family history of obesity.

* * *

[Petitioner] reports that she has consulted with a nutritionist and attended support groups both for weight loss and for bariatric surgery patients. She also has a history of successfully complying with diets, but has not been able to maintain the weight loss she has achieved.

It is my observation that [Petitioner] is mentally and emotionally stable and will be able to successfully comply with post surgical restrictions.

Respondent's Argument

In its final adverse determination, THC offered this explanation for its denial of coverage:

After review of all the information available about the request you appealed, a physician who was not involved in the first request for care and who is a General Surgeon MD, a same or similar specialist who would normally provide the care requested, reviewed the information and determined that the first decision will remain and the request for coverage of Bariatric Surgery is denied. The reason for this decision is:

Documentation that supports 6-9 months of exercise, nutritional & psychological counseling did [not?] meet the health plans criteria. Example: Advance Counseling clearly stating they will not submit counseling sessions of 6-9 months of therapy. Health & Wellness coach documents teaching w/o response or feedback from member that indicates understanding & compliance. The health plan recommends member enrolls into weight watchers program @ no cost to member. Exercise as tolerated with supportive documentation from a recognized program.

Attached you will find the criteria, guideline, protocol or benefit that Total Health Care used in making the decision. . . .

Commissioner's Review

The THC certificate of coverage does not mention bariatric surgery. However, THC has indicated that it provides coverage for bariatric surgery when certain written criteria are met. The document listing the criteria was provided to the Petitioner by THC with the final adverse determination. The pertinent portions of that document are reprinted below:

Members may be considered to receive the surgical intervention for obesity on a case-by-case basis when all of the following criteria are met:

- **Administrative Criteria:**

1. Prior authorization by the Medical Director.
2. Requires referral by primary care physician to a multidisciplinary team who will coordinate treatment of the member at a facility or facilities utilizing a recognized multidisciplinary approach involving a physician with special interest and experience in obesity, a registered dietitian, a

psychologist or psychiatrist interested and experienced in behavior modification and eating disorders, and a surgeon with experience in all aspects of bariatric procedures.

3. Member agrees to long-term behavioral modification support and life-long medical surveillance after surgical therapy.
4. Services must be ordered, arranged, and performed by a Total Health Care affiliated or contracted program.

- **Clinical Criteria**

1. Member must be over the age of 18 years.
2. BMI>40 with at least 2 of the following life-threatening comorbidities that substantially affect the member's health including hospitalization:
 - Symptomatic sleep apnea not controlled by CPAP
 - Severe cardio-pulmonary conditions including congestive heart failure
 - Hypertension inadequately controlled with optimal conventional treatment
 - Uncontrolled hyperlipidemia not amenable to optimal conventional treatment
 - Uncontrolled diabetes mellitus
3. BMI>45 with at least 1 of the above life-threatening, obesity-related comorbidities.
4. Documented compliance with a weight loss regimen as outlined under the Administrative Criteria Section while a member of the health plan including diet, exercise, and behavioral modification for a minimum of 1 year.
5. A psychological evaluation/assessment over 6-9 months must be performed to document emotional stability, and the ability to comply with post-operative limitations and requirements.
6. Member has undergone evaluation to rule-out other treatable causes of morbid obesity.
7. The member shall have only one procedure per lifetime.
8. Documentation of supervised mild to moderate exercise program and able to tolerate for 6-9 months or more.
9. Nutritional counseling monitored with supportive documentation over 6-9 months.

THC's final adverse determination references three preconditions for bariatric surgery which THC believes the Petitioner has failed to meet: exercise, nutrition, and psychological counseling.

An insurer or HMO offering coverage for bariatric surgery is entitled to establish preconditions for the surgery. In an attempt to standardize those preconditions, the Michigan Association of Health Plans (MAHP), an organization of Michigan HMOs (which THC is a

member of), established in 2005 a list of such preconditions which MAHP members agree to apply when evaluating requests for bariatric surgery. The MAHP sought the advice of the Commissioner in establishing those standards and, in September 2006, this agency endorsed the MAHP standards.

The THC standards are very similar to the MAHP standards, although the THC standards for psychological evaluation are significantly more onerous than the MAHP standards. THC requires a psychological evaluation over a period of six to nine months. The MAHP standard is that “[a] psychological evaluation must be performed prior to surgery in order to establish the member’s emotional stability and ability to comply with post-surgical limitations.” The Petitioner received such an evaluation and her therapist, in a letter of June 19, 2011, concluded that Petitioner was a suitable candidate for the surgery. Because the THC standards for psychological evaluation are more restrictive than the MAHP standards, the Commissioner rejects the THC standards as a reason to deny coverage.

MAHP standards do not include separate requirements for exercise and nutrition counseling as does the THC standards. The MAHP standards only require “documented compliance with a weight loss program including diet, exercise, and behavior modification for a maximum of one year.” The Petitioner did participate in a weight loss and dietary counseling program for one year.

Two independent medical reviews were obtained for this case. The internal medicine physician concluded that surgery for the Petitioner was not medically necessary because Petitioner had no life threatening or uncontrolled co-morbidity. That reviewer wrote:

There is no data to support any life-threatening or uncontrolled co-morbidities. The listed blood pressure is 130/80 and there are no notes to support treatment with either anti-hypertensive medications or CPAP therapy. In addition, the reviewed documents reveal that this enrollee has participated in a very modest exercise program from May of 2010 to May of 2011. During that time, the enrollee weight changed from 279 pounds to 258 pounds and this represented a change from 49.4 to 45.6 BMI. Therefore, since the criteria for any life threatening or uncontrolled co-morbidity has not been met, combined with the weight loss as a result of a weight loss program, the continuation of this weight loss program is indicated.

In contrast, the IRO surgeon concluded that bariatric surgery should be approved for the Petitioner:

[Ppetitioner] was enrolled in a comprehensive bariatric program. A multidisciplinary bariatric program including a health and wellness coach, a bariatric surgeon, a psychologist, a gastroenterologist, and her primary care

physician has evaluated the enrollee. She has participated in a supervised weight loss program from May 14, 2010 – May 23, 2011. She was able to lose 21 pounds over this period of time. There are monthly progress notes that document her adherence to this program. The program consisted of dietary counseling and exercise. She has also completed a psychological evaluation. She has been granted clearance for bariatric surgery from a mental health standpoint. Following this evaluation the enrollee was deemed a suitable candidate for laparoscopic adjustable gastric banding.

* * *

The documentation submitted supports that this enrollee meets all generally accepted criteria for patient selection for the proposed operation. The Total Health Care medical policy – Bariatric Surgery Criteria - is not in-line with the current standard of care as established by the National Institutes of Health, the Food and Drug Administration (FDA), and The American Society for Metabolic and Bariatric Surgery.

* * *

This enrollee is morbidly obese with co-morbidities of OSA, HTN, GERD, and arthritis of back, knees, hips, and ankles. She meets all accepted criteria for a bariatric operation. . . .

The Commissioner is not required in all instances to accept an IRO's recommendation. In this case, the Commissioner must accept one recommendation and reject the other. After evaluation of the IRO reports, the Commissioner has determined that the surgeon's report should be accepted. The internist endorses THC's position that a patient with a BMI in excess of 45 must also have at least one life-threatening co-morbidity before bariatric surgery can be approved. The internist concluded that the Petitioner had no life-threatening co-morbidities. However, the Commissioner notes that THC's standards requiring the presence of at least one life-threatening co-morbidity when the candidate has a BMI in excess of 45 is not consistent with the MAHP standard which has no co-morbidity requirement where the candidate's BMI exceeds 45, as is the case with the Petitioner. The IRO surgeon's recommendation is consistent with the standards established by the MAHP, as well as the national standards cited in the IRO surgeon's review. (In any event, THC has not cited co-morbidity standards as a reason to deny coverage.)

The Commissioner finds THC's denial of bariatric surgery is not consistent with appropriate coverage guidelines.

V. ORDER

The Commissioner reverses Total Health Care USA's final adverse determination of August 29, 2011. THC shall provide coverage for the proposed bariatric surgery within 60 days of the date of this Order and shall, within seven (7) days of providing coverage, provide the Commissioner proof it has implemented this Order.

To enforce this Order, the Petitioner may report any complaint regarding implementation to the Office of Financial and Insurance Regulation, Health Plans Division, toll free at (877) 999-6442.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than 60 days from the date of this Order in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of Financial and Insurance Regulation, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.

R. Kevin Clinton
Commissioner